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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1972
No. 71-1231

DEAN FRANCIS PACE,

Petitioner,

vs.

MARION ELENA PACE,

Respondent.

On Petition for a Writ of Certiorari to the California Supreme Court.

REPLY BRIEF FOR PETITIONER.

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REPLY BRIEF FOR PETITIONER.

Questions Presented.

1. Are there independent federal questions?
2. Did the California Court of Appeals itself raise federal adjective Due Process questions independent of state grounds?
   a. Did that Court dismiss appeals not within its jurisdiction so as to deny Due Process within prohibitions of the Fourteenth Amendment to the United States Constitution?
   b. Did that Court misapply *National Union v. Arnold,* 348 U.S. 37 (1954) and *Gilfillan v. McKee,* 159 U.S. 303 (1895) to Family Law severable judgments?

3. If the California Court of Appeal dismissed appeals on the state ground of contempt, was that order substantial, sufficient and independent of federal questions invoking the Sixth and Fourteenth Amendments to the United States Constitution, to wit: did the trial court:
   a. Conduct the OSC *re* Contempt as a "motion" and "not as a trial" by a Commissioner who was not an unbiased judge?
   b. Deny the right of confrontation?
   c. Deny time to prepare a defense?
   d. Lack jurisdiction and enforce a judgment void under both federal and state law?
   e. Enforce payment of debt by imprisonment?
4. If the California Court of Appeal dismissed appeals on the state ground of benefit, was that order in violation of California law and *Gilfillan v. McKee,* 159 U.S. 303 (1895) so that it could not be a substantial, sufficient and independent state ground?
   a. Was the "benefit" community property to which Petitioner is entitled by California law?
   b. Would dismissal of appeals on the ground of benefit be in violation of California law, to wit:
   i. Was the act of acquiescence to the benefit "unconditional, voluntary and absolute"?
   ii. Would the appellant be entitled to the benefit in the event of a reversal of the judgment?

iii. Are divorce judgments severable so that a benefit of community property could not support dismissal of appeals challenging the constitutionality of the new California divorce law?

5. Was the California Court of Appeal Order: "Appeals Dismissed," dependent "upon a determination of fact which only a jury could make but which has not been made," *Securities Commission v. Chenery Corporation,* 318 U.S. 80, 88 (1942) in violation of the Fourteenth Amendment to the United States Constitution?

Statement of the Case.

On March 27, 1972, Petitioner filed a petition for a Writ of Certiorari, docketed as Case Number 71-1231. On March 30, 1972, the Clerk advised by letter that "it was directed to the Court of Appeal of California, Second Judicial District, rather than to the Supreme Court of California."

Counsel for Respondent waived the right to file a brief in opposition by letter to the Clerk dated April 7, 1972. On May 10, 1972, the Clerk advised Counsel for Respondent that this Court requested that a response be filed in this case. A Brief for Respondent in Opposition was filed on or about June 6, 1972, which denied that a federal question has been raised, and further, alleged that there is an independent state ground of contempt or acceptance of benefit.

REASONS FOR GRANTING THE WRIT.

1. There Are Independent Federal Questions.

The Brief by Respondent in Opposition did not contest the issues urged in the Petition, but instead, raised the technical issue on the existence of a federal question. In *National Union v. Arnold,* 348 U.S. 37 (1954), this Court held that denial of the right to appeal on the ground of contempt, constitutes a federal question. In the line of cases set forth in 5 L.Ed.2d 889 (1960), this Court further held that denial of the right to appeal on the ground of accepting the benefit of judgment, constitutes a federal question.

Neither the California Supreme Court nor the Court of Appeal delivered an opinion in the instant case but ruled by postcard. In *Durley v. Mayo,* 351 U.S. 277, 281-282 (1956), this Court recited the rule applicable to the circumstance where the highest Court of the state delivers no opinion and it appears that the judgment *might* have rested upon a nonfederal ground.

> But it is likewise well settled that if the independent (state) ground was not a substantial or sufficient one, it will be presumed that the State Court based its judgment on the law raising the Federal question, and this court will then take jurisdiction (citations omitted). *Dudley v. Mayo, supra,* at 281-282.

Petitioner earnestly pleads that this Court should presume that the California Courts based their judgments upon the law raising the federal questions urged in the following Sections 2 through 5 of this Reply Brief.

2. The California Court of Appeals Itself Raised Federal Questions, Independent of State Grounds.

a. The Court of Appeal Dismissed Appeals Not Within Its Jurisdiction so as to Deny Adjective Due Process Within the Prohibitions of the Fourteenth Amendment to the United States Constitution.

The Brief for Respondent in Opposition argues (at page 2) that "the instant petition for writ of certiorari relates solely to the dismissal of petitioner's ("husband's") appeal from the Interlocutory Judgment of Dissolution of Marriage . . ." If that were true, how does Respondent ignore the November 16, 1971 Nunc Pro Tunc order of the California Court of Appeal, Second Appellate District (set forth at Appendix B, page 6 to the Petition herein), to wit:

> THE COURT:
>
> The minute order of November 4, 1972 *dismissing the above entitled case* is corrected "Nunc Pro Tunc" to read as follows: Motion to Dismiss *Appeals* Granted: *Appeals* Dismissed (emphasis added).

The state court not only dismissed all appeals, it dismissed the case. Then Respondent ignored the December 6, 1971 order of the California Court of Appeal (set forth at Appendix B, page 6 of the Petition herein) which denied findings on appeal, and thereby refused to identify or limit the dismissed appeals. If the *nunc pro tunc* order dismissing the case and appeals is to be taken literally, all six pending appeals and all future appeals in Pace v. Pace, [illegible]779053, are dismissed, even though none of the appeals had been certified to the California Court of Appeal and two of the appeals were filed after its *nunc pro tunc* order of November

16, 1971. Thereby, as urged on pages 5-6 of the Petition herein, "The California Court of Appeal Lacked Jurisdiction and Denied Adjective Due Process Within the Prohibitions of the Fourteenth Amendment to the United States Constitution," independent of the state grounds of contempt or benefit.

b. The California Court of Appeal Misapplied National Union v. Arnold, 348 U.S. 37 (1954) and Gilfillan v. McKee, 159 U.S. 303 (1895) to Family Law Severable Judgments.

The dismissal of appeals by the California Court of Appeal is in apparent conflict with the decisions of this Court in *National Union v. Arnold*, 348 U.S. 37 (1954) *re* contempt and *Gilfillan v. McKee*, 159 U.S. 303 (1895) re benefit; and accordingly, raises issues of adjective Due Process under the Fourteenth Amendment to the United States Constitution. Conceding *arguendo* that there were independent state grounds of contempt and benefit, *a fortiori* does that deprive Petitioner:

1. Of all future appeals in perpetuity in Pace v. Pace, D779053, *e.g.*, custody, support and other matters in which the state court retains continuing jurisdiction, and/or
2. Of appeals on severable portions of a judgment, primarily the constitutional validity of the new California divorce law?

The California Supreme Court has frequently held that "the concept of divisible divorce is a part of the public policy of this state." Specifically divisible are "property" and "terminating the marriage relationship," *Lopez v. Lopez*, 63 Cal.2d 735, 737-738; 408 P.2d 744

(1965) and cases cited therein. Thus, it should not be *assumed* that the Court of Appeal Order: "Appeals Dismissed", is valid under California law as to that portion of the judgment which dissolves the marriage, nor valid under California law as to all six appeals dismissed (three civil and three criminal).

Nor is that order valid under federal law, as enunciated by this Court. In *Gilfillan v. McKee*, 159 U.S. 303 (1895), this Court granted an appeal on the ground that a judgment may be severable if a benefit was accepted on a portion thereof. To deprive a Family Law litigant of access of the courts in perpetuity for contempt, would be a significant extension of *National Union v. Arnold*, 348 U.S. 37 (1954) which involved a dollar sum certain and did not consider severable judgments nor Family Law where the state retains continuing jurisdiction. Family Law liberties, *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) are continuously subject to modification by the trial court, and consequently, should be continuously subject to review on appeal.

3. If the California Court of Appeal Dismisses the Case and Appeals on the State Ground of Contempt, Its Order Could Not Be Substantial, Sufficient and Independent of Federal Questions Invoking the Sixth and Fourteenth Amendments to the United States Constitution.

Suffice it to say that the Brief by Respondent in Opposition fails to contest that the trial court:

a. Conducted to OSC *re* Contempt as a "motion" and "not a trial" by a Commissioner who was not an unbiased judge (pages 23-25 of the Petition herein).

b. Denied the right of confrontation (pages 23-25 of the Petition herein).

c. Denied time to prepare a defense (page 26 of the Petition herein).

d. Lacked jurisdiction and enforced a judgment void under both federal and state law (pages 8-15 and 18-22 of the Petition herein).

e. Enforced payment of debt by imprisonment (page 26 of the Petition herein).

By ignoring the errors of the Commissioner at the OSC *re* Contempt, apparently Counsel for Respondent and the California Appellate Courts believe that the errors will go away. Will this Honorable Court hold that there is a sufficient and independent state ground for contempt conviction in the face of flagrant violations of the Sixth and Fourteenth Amendments to the United States Constitution?

Petitioner earnestly submits (at page 28 of the Petition herein) that in *National Union v. Arnold*, 348 U.S. 37 (1954), this Court did not reach the issue of a contempt conviction by the trial court that is "final and conclusive" by the state law: California Code of Civil Procedure, Section 1222 (set forth in Appendix A of the Petition). Indeed, an unscrupulous judge could render "final" any of his judgments by simply issuing a contempt order against a litigant who objects that his judgment was premature, prejudicial and void (pages 19-22 of the Petition herein), thereby precluding appellate review of his judgment in its entirety. It bears emphasis that the inequity of the trial court Commissioner has been aggravated by the unclean hands of Counsel for Respondent, who approaches this Court in

Equity. The Brief for Respondent in Opposition does not deny his breach of stipulation (pages 19-22 of the Petition herein), nor could he for it is a matter of record. Yet that same Counsel sought and obtained from that same Commissioner, imprisonment without appeal, to enforce his stipulation that was altered *ex parte*.

In the Brief in Opposition, Respondent gratuitously alleges (pages 6-7) that Petitioner "could have appealed without demanding the various monies held in trust by Latham & Watkins and without putting himself in contempt of Court." That assertion is diametrically opposed to the argument by Counsel for Respondent in open Court on January 18, 1971 and his stipulation on June 3-4, 1971. Moreover, Petitioner was *ordered* by the Interlocutory Judgment to take community funds and use them to discharge community obligations (as admitted on page 3 of the Brief in Opposition). If Petitioner followed the orders in the Interlocutory Judgment (which he ultimately did), Respondent argues that he "accepted benefits" from the judgment, and thereby forfeits appeal. Conversely, if Petitioner refuses to take the "benefits" of the judgment, he can be found in contempt for not accepting and using the funds as directed; and that contempt, Respondent argues, would also bar his right to appeal. That dilemma violates the Equal Protection of the Law, in that only wealthy husbands with sufficient separate property may preserve their right to appeal by satisfying community debts or by filing a supersedeas bond (in California, one and one-half times the amount of the judgment appealed). Family Law appeals in California, therefore, are discriminatorily available only to independently wealthy husbands, an obvious violation of the Equal

Protection guarantees of the Fourteenth Amendment to the United States Constitution.

The infant daughter of the parties is an implicit party vitally affected by the judicial dissolution of her natural family. *She* has not accepted a "benefit" nor is *she* in contempt. Yet it is undeniable that *she* has an interest in an appellate review of the constitutional validity of state action ordering the dissolution of her parent's marriage.

4. If the California Court of Appeal Dismissed Appeals on the State Ground of Benefit, Was That Order in Violation of California Law and Gilfillan v. McKee, 159 U.S. 303 (1895) so That It Could Not Be a Substantial, Sufficient and Independent State Ground.

a. The Alleged "Benefit" Was Community Property to Which Petitioner Is Entitled by California Law.

In California, the husband has "management and control of the community personal property with like absolute power of disposition," California Civil Code, Section 5125. The power of the husband over community property exists until the entry of a *final* decree, *Harrold v. Harrold,* 43 Cal.2d 77; 271 P.2d 489 (1954); *Vai v. Bank of America,* 56 Cal.2d 329; 364 P.2d 247 (1961).

The "benefit" alleged was "$17,178 from funds held by Latham & Watkins, attorneys for the wife." The $16,427 (not $17,178) was community property as evidenced by the pleas and stipulations of Counsel for Respondent in the trial court record, to wit:

1. At a OSC hearing on January 18, 1971, Counsel for Respondent made a vigorous plea to the trial

court that the family home (in which Petitioner lived alone for five months after his wife deserted him) be sold to pay community debts, and that proceeds be paid to Counsel for Respondent for that purpose. On April 1, 1971, the home was sold and the net proceeds ($23,428 subject to taxes) was paid out of escrow directly to Counsel for Respondent pursuant to the order of the Court. From April through June 23, 1971, Counsel for Respondent repeatedly refused to pay or to release the fund for payment of community debts, and continued that refusal to the interlocutory hearing on June 3, 1971. On June 23, 1971, Counsel for Respondent *asked Petitioner* to take the money to pay community debts so that his client would not be subject to threatened litigation by creditors. On that June 23, 1971, Counsel for Respondent conceded that he had personally inquired of the Clerk of the Superior Court whether the trial court Commissioner had prematurely filed the interlocutory judgment (documented at lines 17-26, page 35 of the July 19, 1971 OSC *re* Contempt transcript of record) so as to render the judgment void under California law (pages 19-22 of the Petition herein). There was extended discussion of motions, appeal and the inability of either party to pay community debts or post bond pending motions or appeal. Whereupon, a compromise was made so that the $16,427 stipulated amount to pay community debts, taxes and other community obligations, would be handed over to Petitioner as manager of the community, without any reference to the Interlocutory Judgment whatsoever (note the lack of any reference to the Interlocutory Judgment in the receipt for the $16,427 prepared by Counsel for Respondent and attached to Respondent's Appendix B at page 29).

2. On June 3-4, 1971, Counsel for Respondent stipulated that the $23,428 fund which it held was community property. Indeed, Counsel for Respondent argued vehemently for the designation of community property so that the fund would not be judged the separate property of Petitioner.

3. On September 25, 1971, nine days before the Interlocutory hearing on June 3-4, 1971, Counsel for Respondent took the deposition of Petitioner, who under subpoena produced records of community debts in excess of the $16,427 received on June 23, 1971.

What is the legal benefit? Petitioner concedes that he also received other community property, including an automobile, royalties, office equipment, furnishings and the clothes on his back. As applied to Family Law, Petitioner earnestly urges that if community property constitutes a benefit, a marital partner would have to go naked in the street in order not to waive the right to appeal.

b. Dismissal of Appeals on the Ground of Benefit Would Be a Violation of California Law.

The Brief for Respondent in Opposition failed to cite the leading California case on acceptance of benefit, *Gudelj v. Gudelj*, 41 Cal.2d 202, 214; 259 P.2d 656 (1953), wherein it was held:

> "It is the settled rule that the voluntary acceptance of the benefit of a judgment or order is a bar to the prosecution of an appeal therefrom." However, "(i)n order to bar the right of appeal on the ground of acquiescence, 'the acts relied upon must be such as to clearly and unmistakably show acquiescence, and it must be *unconditional, voluntary, and absolute.*'" "It is only in cases

where an appellant is shown to have received and accepted advantages from a judgment to which such appellant would not be *entitled in the event of a reversal of the judgment* that her acceptance thereof has been held to operate to defeat the appeal." Otherwise stated, "(w)here the different portions of a judgment are severable, a party by voluntarily accepting the fruits of one portion thereof *does not necessarily estop himself to attack other and severable portions thereof on appeal*" (citations omitted and emphasis added), *Gudelj v. Gudelj, supra* at 214.

Conceding *arguendo* that there was a benefit, Petitioner respectfully submits that none of the conditions of California law, *Gudelj v. Gudelj, supra* at 214, have been fulfilled in the instant case.

i. *The act of acquiescence to the benefit was not "unconditional, voluntary and absolute."*

The $16,427 was not unconditional but was specifically for payment of community debts and taxes (conceded at page 3 of the Brief in Opposition).

The $16,427 was not voluntary in that Petitioner has no other funds (acknowledged repeatedly by Respondent in the record) with which to pay community debts. If the fund had been retained by Counsel for Respondent pending appeal, the community, husband and wife, would have been thrown into litigation and bankruptcy.

The $16,427 was not absolute in that Petitioner was placed in the dilemma of being ordered by the Court to pay community debts but was without the funds to pay them. If he fails to pay them, he is in contempt; if he secures the funds to pay them, he has accepted a

benefit. In a clever legal maneuver, nine days after the $16,427 was delivered to Petitioner, Counsel for Respondent secured an injunction restraining the expenditure of the $16,427, so that both benefit and contempt would be alleged in the OSC *re* Contempt and to the appellate Courts. Petitioner acknowledges that he has been expertly duped.

ii. *Petitioner would be entitled to the benefit in the event of a reversal of the judgment.*

The $16,427 (or $17,178) alleged benefit is a stipulated amount. Unless Counsel for Respondent would renege on his stipulation, Petitioner would be entitled to at least $16,427 or $17,178 in the event of reversal of the Interlocutory Judgment.

iii. *Divorce judgments in California are severable so that a benefit of community property could not support dismissal of appeals challenging the constitutionality of the new California divorce law.*

The California Supreme Court has ruled that "the concept of divisible divorce is a part of the public policy of this state." Specifically divisible are "property" and "terminating the marriage relationship", *Lopez v. Lopez,* 63 Cal.2d 735, 737; 403 P.2d 744 (1965). The only benefit alleged by Respondent relates to $17,178 in community personal property which is severable from the constitutional challenge on the validity of the new California divorce law (pages 8-15 of the Petition herein). Dismissal of six appeals (three civil and three criminal) by the California Court of Appeal on the state ground of benefit, would violate California law, *Gudelj v. Gudelj, supra* at 214, and would be in apparent conflict with the decision of this Court in *Gilfillan v. McFee,* 159 U.S. 303 (1895) with regard to severable judgments.

5. The California Court of Appeal Order: "Appeals Dismissed", Was Dependent "Upon a Determination of Fact Which Only a Jury Could Make but Which Has Not Been Made", in Violation of the Fourteenth Amendment to the United States Constitution.

In *Securities Commission v. Chenery Corporation,* 318 U.S. 80, 88 (1942), cited by Respondent, this Court ruled that the decision of a lower court must be affirmed if the result is correct "although the lower court relied upon a wrong ground or gave a wrong reason" and then held:

> But it is also familiar appellate procedure that where the correctness of the lower court's decision depends upon a determination of fact which only a jury could make but which has not been made, the appellate court cannot take the place of the jury. *Securities Commission v. Chenery Corporation, supra* at 88.

The California Court of Appeal was presented with three *factual* defenses in opposition to Respondent's Motion to Dismiss an Appeal on November 4, 1971. The factual defenses were of sufficient weight that a trial court could not have granted summary judgment.

1. That the contempt, if valid, had been purged.

2. That the declaration by Counsel for Respondent (the only declaration filed) constituted hearsay and/or perjury.

3. That the Interlocutory Judgment was in fact premature, prejudicial and void (a mixed fact-law issue).

On November 4, 1971, the Motion to Dismiss an Appeal was submitted to the California Court of Appeal without the trial court record and without any

hearing by a Master or the Court on the three factual defenses. That same afternoon, the Court of Appeal granted the motion to dismiss. Consequently, in order to act within a matter of hours, the Court of Appeal would have had to depend "upon a determination of fact which only a jury could make but which has not been made", to wit:

1. That the contempt in fact had not been purged (negated by the trial court (the jury or trier of fact) eleven days later, without changed circumstances: ". . . the Court finding that the respondent (Petitioner herein) has made a good faith effort to comply with the Court's order").

2. That the facts in the Moving Party's declaration were accurate, current and complete in compliance with due process: trial, confrontation and cross-examination (which, of course, the Court of Appeal could not do because there was no record).

3. That the stipulation in the Interlocutory Judgment in fact had not been altered *ex parte* or filed prematurely to the prejudice of the appellant and in violation of California law.

How did the California Court of Appeal make its determination? Is it true that the Court of Appeal simply took notice of the certified contempt conviction order of July 19, 1971 by the trial court which is "final and conclusive" under California law (California Code of Civil Procedure, Section 1222 set forth in Appendix A to the Petition herein) and peremptorily dismissed the appeals. If so, its order could not be sufficient and independent of the federal questions invoking the Sixth and Fourteenth Amendments to the United States Constitution (as urged at pages 7-10 of this Reply

Brief). If not, the Court of Appeal would have had to dispose of the three factual defenses as a jury (trier of fact) in violation of *Securities Commission v. Chenery Corporation, supra* at 88.

The dangers of an appellate court acting upon a hodge podge of declarations by counsel, instead of a trial court record, could not be more evident than in the Brief by Respondent in Opposition, which is replete with "clerical" errors, including primarily:

1. Page 7: erroneous citations of the dates of hearings and rulings by the Court.

2. Inclusion of Appendix D (Clerk's Transcript) which is dated by the County Clerk on November 15, 1971, eleven days after the California Court of Appeal order on November 4, 1971. Said Clerk's Transcript was not transmitted to the Clerk of the Court of Appeal until March 8, 1972, and to date, it has not been filed in either the California Court of Appeal or the California Supreme Court.

The ethics of those "clerical" misrepresentations by Counsel for Respondent, shall be entrusted to the conscience of this Court.

Trial by appellate courts based solely upon hearsay declarations, without the trial court record or due process, should constitute one of the most flagrant violations of the Fourteenth Amendment to the United States Constitution.

Conclusion.

The federal questions raised by the practice of the California courts are merely symptomatic in the instant case. The California Family Law Courts have degenerated into a perfunctory attitude toward one of the most fundamental liberties in society. The record will reflect that the Chief Judge of the Los Angeles Family Law Court, on June 3, 1971, asked the rhetorical question whether Petitioner would deny the right of the California Legislature to authorize divorce by mailing a postcard to the County Clerk. The decisions of this Court assure the indicted accused of endless months of trial by jury while in the same courthouse Family Law litigants are begrudged a few hours of the Court's time. In California, it is known as assembly-line justice. Divorce in five minutes. Why? A standardless divorce law. But there is a greater fault, known in California as postcard jurisprudence. Court orders, without reason, create distrust in counsel and litigants alike. Conjecture is substituted for reason. If society in the United States cannot find reason in the judgments of the Courts, how can society be expected to revere the law? "Appeals Dismissed" is the utterance of authoritarian power, devoid of reason. Is it law or authoritarian power that takes a man's liberties without reason, limitation or restraint?

Once again, Petitioner earnestly pleads, on behalf of the social interest, that this Honorable Court take jurisdiction and restore the rule of law, not of men, to Family Law in the State of California.

Dated: September 1, 1972.

Respectfully submitted,

DEAN FRANCIS PACE,
Petitioner.

CERTIORARI DENIED